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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 650

HARTFORD ACCIDENT AND INDEMNITY COMPANY ET AL.,

Appellants,

vs.

DELTA & PINE LAND COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PETITION FOR REHEARING.

WALTER SILLERS,
OSCAR JOHNSTON,
GARNER W. GREEN,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 650

HARTFORD ACCIDENT AND INDEMNITY COMPANY ET AL.,

Appellants,

vs.

DELTA & PINE LAND COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

PETITION OF THE APPELLEE, DELTA & PINE LAND COMPANY, FOR REHEARING.

The undersigned, your petitioner, respectfully submits that it has been aggrieved by the opinion of your Honors rendered herein on the 9th day of April, 1934, in the respects hereinafter set forth and prays for a rehearing of said matter.

With deference we respectfully submit that this cause should be affirmed for the following reasons:

The demurrer filed to defendant's plea raises two questions:

(1) That the bond sued on in this cause is a contract of insurance on interest in Mississippi; that the breach of the contract occurred in Mississippi and the cause of action arose in this state; that the employee whose fidelity was guaranteed was in Mississippi at the time of the defalcation complained of, and both of the parties, appellant and appellee, were in Mississippi and doing business in this state at the time of the breach of the contract. The cause of action was filed in the Courts of Mississippi, therefore, the contract, insofar as this cause of action is concerned, is a Mississippi contract and should be construed according to the laws of Mississippi, and under the laws of this state the provision which requires that "any claim hereunder must be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee," is in conflict with the Mississippi law and is therefore inoperative.

(2) That the provision in the policy sued on which requires that "any claim hereunder must be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee," is not a substantive right under the contract but is an adjective right and pertains to the remedy of enforcement of the contract, and being in conflict with the Statute of Mississippi (Section 2294, Code of Mississippi 1930), is unenforceable in the Courts of this State.

In other words appellee contends that under the facts in this case as presented by the pleadings:

(1) The contract, although made in Tennessee, is, for the purpose of this suit, a Mississippi contract because it

is an insurance policy on property and/or interests in Mississippi and thereasto the Mississippi statute (Section 5131, Code of 1930) defining insurance and providing that "all contracts of insurance on property, lives or interests in this state shall be deemed to be made therein," applies, and the contract should be construed according to the laws of Mississippi and not according to the laws of Tennessee; and,

(2) The appellee further contends that even though it be held that the contract is not a Mississippi contract but is a Tennessee contract and the laws of that state shall control as to the substantive rights of the parties, yet the adjective rights—that is to say the rights pertaining to the remedy, are controlled by the laws of Mississippi; that the clause "any claim hereunder must be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee," is a limitation upon the action, is an adjective right and pertains to the remedy and being in conflict with the laws of Mississippi the same is unenforceable in the Courts of this state.

This Court in its decision herein complained of being of contrary view to that of the Mississippi Supreme Court, has reversed this cause on principles applicable to point (1) hereinabove referred to, but, with deference, did not pass on or adjudicate the principles raised in point (2) hereinabove referred to.

We respectfully submit that notwithsfanding the holding of this Court as to the principles raised in point (1) *supra*, this cause should be affirmed upon the principles applicable to point (2) *supra*, and in support of our contention, we submit:

(a) The clause, "any claim hereunder must be duly made upon the surety within fifteen (15) months after the ter-

mination of the suretyship for the defaulting employee," is a limitation upon the action, is an adjective right and pertains to the remedy.

The instrument sued on herein is a bond or contract of insurance indemnifying the appellee against loss sustained through fraud or dishonesty or wilful misapplication, among other employees, of H. H. Harris, its treasurer, during the period from January 1, 1929 to January 1, 1930. The defalcation by Harris occurred between May 9, 1929 and December 20, 1929, at a time when the insurance contract was in full force and effect. Immediately upon the defalcation liability was imposed upon the appellant to pay to the appellee the full amount of such defalcation. The substantive obligation of the contract therefore is the duty of the appellant to pay to the appellee the defalcation for which liability was already imposed and existed under the terms of the contract. The provisions requiring the giving of written notice to the surety at its home office, the filing of proof of loss under oath within three months after discovery of defalcation, and the making of claim upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee, and proviso that no suit, etc., shall be brought against the surety after expiration of twelve months after filing of proof of loss, etc., are provisions pertaining to the limitation upon the action, and do not pertain to liability, therefore affect the remedy and not the substantive agreement between the parties. *National Surety Company* v. *Architectural Decorating Company*, 226 U. S. page 276, 57 L. Ed. p. 221, from which we quote:

> "In the case now before us, we agree with the Minnesota supreme court in the view that the requirement of a preliminary notice to the obligors as a condition precedent to an action upon the bond effects the rem-

edy, and not the substantive agreement, of the parties. And although the statute as it stood when the bond was given (Rec. Laws 1905, Sec. 4539) must, under *Grant* v. *Berrisford,* be treated as if written into the contract, it still imposed a condition not upon the obligation, but only the remedy for breach of the obligation. Therefore, the subsequent statute (Gen. Laws 1909, Chap. 413) effected merely a change in the remedy, without substantial modification of the obligation of the contract."

General Accident & Assurance Co. v. *Walker,* 99 Miss. 404, 55 So. 31;
Dodson v. *Western Union Telegraph Co.,* 97 Miss. 104, 52 So. 693;
Illinois Central R. R. Co. v. *Jordan,* 108 Miss. 140, 66 So. 406;
Standard Accident Ins. Co. v. *Broom,* 111 Miss. 409, 71 So. 653;
National Casualty Co. v. *Mitchell* (Miss.), 138 So. 808;
Western Union Telegraph Co. v. *Eubanks,* 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711.

(b) The Clause in the policy providing: "Any claim hereunder must be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee", being a provision pertaining to remedy it is governed by the *lex fori* and therefore the laws of Mississippi apply as to its validity and not the laws of Tennessee.

Page on Contracts, Sec. 3624;
12 C. J. 483;
37 C. J. 729;
14 R. C. L. 1418;
L. & N. R. R. v. *Pool,* 72 Miss. 487, 16 So. 753;
Y. & M. V. R. R. v. *Willis,* 111 Miss. 303, 71 So. 563;

Fisher v. *Burke*, 123 Miss. 718;
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Adams Express Co. v. *Walker*, 67 L. R. A., 412, 119 Ky. 121, 83 S. W. 106;
Townsend v. Jamison, 9 How. 407, 13 L. Ed. 194;
Hanger v. Abbott, 6 Wall. 532, 18 L. Ed. 939;
Williard v. Wood, 164 U. S. 502, 41 L. Ed. 531;
Great Western Tel. Co. v. *Purdy*, 162 U. S. 329, 40 L. Ed. 936;
Galliher v. *State Mutual Life Ins. Co.*, 43 So. 833 (Ala.)

See also the recent Mississippi cases: *D'Antoni* v. *Teche Lines Inc.*, 143 So. 415 and *Boothe* v. *Teche Lines Co.*, 143 So. 418.

(c) The clause "any claim hereunder must be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee", being a provision pertaining to remedy and not to substantive rights under the contract, and the same being governed by the *lex fori*, is void because in conflict with the statute of Mississippi. (Sec. 2294, Code Mississippi 1930) which provides:

> "The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contract stipulation whatsoever shall be absolutely null and void; the object of this statute being to make the period of limitations for various causes of action the same for all litigants,"

because it is an attempt to change the statute of limitations of Mississippi. See authorities cited *supra*.

(d) Although the contract was made in Tennessee and is a Tennessee contract, the validity of the clause "any claim

hereunder must be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee," must be determined by the laws of Mississippi.

In support of this proposition we cite the following cases wherein the facts were very similar to the facts in this case, and wherein the courts held in accordance with our contention here:

Galliher v. *State Mutual Life Ins. Co.*, 43 So. (Ala.) 833. (In this case we call the Court's attention to the similarity between Sec. 2602 Code Alabama 1896 and Sec. 2294 Mississippi Code 1930.)

Adams Express Co. v. *Walker*, 119 Ky. 121, 83 S. W. 106, 67 L. R. A., 412.

Western Union Tel. Co. v. *Eubanks*, 100 Ky. 591, 38 S. W. 1068, 36 L. R. A., 711.

St. Louis & S. F. R. R. Co. v. *Bryce*, 110 S. W. 529 (Texas).

Southern Kansas R. R. Co. of Texas v. *Burgess*, 90 S. W. 189 (Texas).

Wherefore, and for other reasons appearing in petitioner's briefs, petitioner respectfully urges that a rehearing may be granted and that the mandate of this Court may be stayed pending the disposition of this petition.

Respectfully submitted,

DELTA AND PINE LAND COMPANY
OF MISSISSIPPI,
WALTER SILLERS,
OSCAR JOHNSTON,
By GARNER W. GREEN,
Its Attorneys.

I, Garner W. Green of Jackson, Mississippi, an attorney regularly admitted to practice in the Supreme Court of the United States, do certify that, in my opinion, the foregoing petition for rehearing in the case of Hartford Accident & Indemnity Company versus Delta & Pine Land Company, No. 650, is well founded and is not presented for the purpose of creating a delay.

This, the 26 day of April, 1934.

GARNER W. GREEN.

(4930-C)

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 650.—October Term, 1933.

Hartford Accident & Indemnity Company, et al., Appellants, vs. Delta & Pine Land Company. } Appeal from the Supreme Court of the State of Mississippi.

[April 9, 1934.]

Mr. Justice Roberts delivered the opinion of the Court.

This was an action instituted in a circuit court of Mississippi by Delta & Pine Land Company, a corporation of that state, with its principal place of business therein, against Hartford Accident & Indemnity Company, a corporation of Connecticut, having its principal place of business in Hartford in that state. The declaration alleges that on or about January 1, 1928, the plaintiff applied to the defendant for a fidelity bond and paid the agreed premiums therefor, and the defendant executed and delivered to the plaintiff such a bond, whereby it bound itself to pay the plaintiff, within sixty days after satisfactory proof, pecuniary loss sustained by the plaintiff through fraud or dishonesty or wilful misapplication by any employee "in any position, anywhere," from the time that the name of such employee should be placed upon a schedule attached to the bond to and including the termination of the suretyship for such employee by his dismissal, retirement from service, discovery of loss, or cancellation of the bond by the parties. It is alleged that the name of H. H. Harris, as treasurer of the plaintiff, appears upon the schedule, and that the amount of coverage for him is $25,000. Sundry defalcations by Harris between May 9, 1929, and December 20, 1929, totaling $2703.79, are set forth, all of which and the resulting loss occurred in the first judicial district of Bolivar county, Mississippi. The further material matters charged are that the defendant throughout all the times mentioned in the declaration, and ever since, was and now is duly qualified and licensed to do business in Mississippi; that the dishonest acts of Harris were discovered on or about May 20, 1931, immediate notice given to the defendant at its home office, and affirmative proof of loss under oath, with full particulars, filed with the de-

fendant at its home office within three months after the discovery. The declaration in conclusion asserts compliance by plaintiff with all the terms of the bond, and refusal of the defendant, though requested, to make payment of the sum demanded. Annexed to the declaration are copies of the bond and the supplementary schedules forming part of it.

The defendant's plea was, in substance: the plaintiff, before and at the date of the contract of suretyship, was doing business in Tennessee, with its principal office at Memphis in that state, and defendant also was then and is now doing business in Tennessee, having an agency at Memphis; plaintiff, through its office at Memphis, applied to defendant through its agency there for the bond, rider and schedules containing the name of the defaulting employee, Harris, constituting the contract of suretyship; defendant through its agency at Memphis executed and delivered the bond and schedules to plaintiff at its office in that city; the contract is a Tennessee contract and governed by the laws of Tennessee, and full faith and credit must be given to it in the courts of Mississippi in accordance with the requirements of Article IV, Section 1, Article I, Section 10, and Section 1 of the 14th Amendment of the Constitution of the United States; there was not at the time of delivery of the contract, and is not now, any statute in Tennessee prohibiting or invalidating the condition or limitation in the contract to the effect that any claim thereunder must be duly made upon the defendant as surety within fifteen months after the termination of the suretyship for the defaulting employee, and the plaintiff did not make claim upon the defendant for the loss within fifteen months after the termination of the suretyship for Harris, as the contract was cancelled and terminated December 31, 1929, and the plaintiff made no claim until June 22, 1931.

To this plea the plaintiff demurred, assigning these causes of demurrer: (1) the construction and validity of the provision of the contract relied upon in the plea is to be determined by the laws of Mississippi, and not by the laws of Tennessee; (2) the statute of limitations of the state where suit is brought is the statute which governs the time for bringing this action, and the provision in the contract requiring that any claim thereunder must be made upon the defendant within fifteen months after the termination of the suretyship of the defaulting employee is in violation of Section 2294 of the Mississippi Code of 1930, and in violation of the pub-

lic policy of Mississippi, and its courts are not required to give full faith and credit to this provision of the contract by Article IV, Section 1, Article I, Section 10, or Section 1 of the 14th Amendment of the Constitution.

The cause came on for hearing upon the pleadings, and the court sustained the demurrer. The defendant declined to plead further; whereupon judgment was entered by default in favor of the plaintiff, a jury was impaneled and assessed damages at the amount claimed, and final judgment was accordingly entered.

Upon appeal by the defendant the Supreme Court of Mississippi affirmed the judgment. Conceding that under the decisions of the Supreme Court of Tennessee the provision for notice within fifteen months of the termination of the suretyship is a valid limitation of liability and not a limitation of action, the court said the converse is true in Mississippi. Although the bond was executed and delivered and the agreement consummated in Tennessee, where the plaintiff and the defendant's agent had their respective offices, and where, in the absence of proof of a contrary intent, the contract was to be performed, the court concluded that the statutes of Mississippi made the instrument a Mississippi contract, and annulled the contractual limitation of the time for giving of notice of claim.

The Mississippi statutes relied upon were the following:

"A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction, loss or injury of something in which the assured or other party has an interest, as an indemnity therefor; and it shall be unlawful for any company to make any contract of insurance upon, or concerning any property or interest or lives in this state, or with any resident thereof; or for any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of such insurance unless and except as authorized under the provisions of this chapter. All contracts of insurance on property, lives or interests in this state shall be deemed to be made therein." (Section 5131 of the Mississippi Code of 1930.)

"The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contract stipulation whatsoever shall be absolutely null and void; the object of this statute being to make the period of limitations for the various causes of action the same for all litigants." (Section 2294 of the Mississippi Code of 1930.)